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MARTIAL LAW

In a recent address before the Lawyers Club of Los Angeles about the fifth column, Earl Warren, the Attorney General of California, quite pointedly asked how we are going to meet the problems to which their activities give rise: "Can we meet it with civilian authority alone, or must we have martial law?" In his opinion, martial law, which has been defined as "the public law of necessity," is the only answer. He believes that the time is here "when the commanding general of the area must have the final say. After all, he is the only one on the coast who has all the information available."

The appalling confusion and lack of able leadership which have existed in some parts of our vital civilian defense efforts give emphasis to the remarks of the Attorney General. A growing interest on the part of the Bar in the subject of martial law is evidenced by the increasing number of well considered discussions on the subject appearing in law reviews and other legal periodicals throughout the country. Such an article, in condensed form, appears in this issue of the BAR BULLETIN.

The fact is that we on the west coast are living today under a modified form of martial law, and the Military Commander of this military area in which we live has authority, whenever he "deems such action necessary or desirable," to control by his orders our every-day lives, to afford every possible protection in aid of the national defense—and to enforce compliance with such restrictions as he may find it necessary or desirable to impose.

It may be that martial law is "the public law of necessity," as the Attorney General points out. Public necessity urgently requires that the Bench and the Bar become fully acquainted with the full meaning of that term and its Constitutional background, and of the part they will be called upon to take when the Military Commander deems it necessary or desirable to further exercise his authority for our protection.

THE BULLETIN solicits articles of interest to the members of the legal profession. However, we assume no responsibility for the views expressed by any contributor, which may not necessarily accord with those of the Trustees or of the Committee. Material must be submitted not later than the tenth of each month for publication in the next issue.



MARTIAL LAW IN HAWAII*

Garner Anthony

THE declaration of martial law in the Territory of Hawaii as a result of the Japanese raid on Pearl Harbor presents profound problems not only to the legal profession but to all persons in Hawaii, military and civilian alike. The current tension on the west coast, coupled with suggestions of applying martial law in certain mainland areas, makes an inquiry into that ill-charted field a matter of national concern.

MARTIAL LAW PROCLAIMED

On Sunday, December 7, 1941, J. B. Poindexter, Governor of the Territory of Hawaii, by proclamation, invoked the powers granted him under the Hawaiian M-Day Bill.¹ On the afternoon of the same day the Governor issued a second proclamation calling upon the Commanding General of the Hawaiian Department to prevent the invasion, suspending the privilege of the writ of habeas corpus, and requesting and authorizing the Commanding General

"... during the present emergency, and until the danger of invasion is removed, to exercise all the powers normally exercised by me as Governor ... and ... to exercise the powers normally exercised by judicial officers and employees of the territory and of the counties and cities therein, and such other and further powers as the emergency may require ..."²

Immediately following this proclamation Lieutenant General Walter C. Short, Commanding General, Hawaiian Department, U. S. Army, issued a proclamation³ to the people of Hawaii, in which he said,

"... I have this day assumed the position of military governor of Hawaii, and have taken charge of the government of the Territory, of the preservation of order therein, and of putting these islands in a proper state of defense. ... I shall therefore shortly publish ordinances governing the conduct of the people of the Territory with respect to the showing of lights, circulation, meetings, censorship, possession of arms, ammunition, and explosives, the sale of intoxicating liquors and other subjects."

The proclamation of martial law was immediately communicated to the President of the United States pursuant to section 67 of the Hawaiian Organic Act,⁴ who promptly approved the action of the Governor in suspending the privilege of the writ of habeas corpus and placing the Territory of Hawaii under martial law. The day following the proclamation, the Territorial courts were closed by order of the Commanding General, and the Chief Justice of the Supreme Court of Hawaii signed an order which was posted at the entrance of the Judiciary Building announcing the closing of all Territorial courts. No statute authorizes the Chief Justice to close the courts, nor is there any authority in the Organic Act for the complete delegation of power by the Governor and the appointment of a Military Governor.

When Lieutenant General Walter C. Short was relieved of his command on December 17, 1941, he issued a proclamation stating that he had relinquished

*Under this caption the *California Law Review* for May, 1942, published an article by Garner Anthony, Esquire, a practicing attorney of Honolulu, Hawaii; A. B. Swathmore College; LL. B., Howard University, 1926. The BAR BULLETIN has obtained consent of the *Review* to publish this condensation of Mr. Anthony's article. Space does not permit publication of the several proclamations of the Governor of the Territory and of the Commanding General as Military Governor, which appear in full in the appendices, as indicated in the footnotes. To the extent that the footnotes are published here, the original numbering is retained.

¹Appendix I.

²Appendix II.

³Appendix III.

⁴31 Stat.(1900) 153, 48 U.S.C.(1940) §532.

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command of the Hawaiian Department [to his successor.] The transfer of the office of Military Governor of the Territory of Hawaii from Lieutenant General Short to Lieutenant General Emmons was accomplished without any action on the part of Governor Poindexter, this undoubtedly upon the theory that Governor Poindexter had appointed as Military Governor of Hawaii not an individual as such, but the individual holding the position of Commanding General, Hawaiian Department, U. S. Army.

HAWAII IS AN ORGANIZED TERRITORY

The Territory of Hawaii has a government created under an act of Congress, the Hawaiian Organic Act,⁸ which in the traditional American pattern embodies the doctrine of the separation of powers into legislative, executive and judicial. The Governor of the Territory of Hawaii, judges of the territorial courts of record (the supreme court and circuit courts), and the judges of the United States district court for the Territory are appointed by the President of the United States by and with the advice and consent of the Senate, and hold office at the will of the President.

The powers of Congress over territories are plenary, subject only to applicable provisions of the Constitution. It may either legislate directly as to local affairs or delegate the power to a legislature elected by the citizens.¹⁰ The latter course was chosen for Hawaii.

The Act creating the Territory of Hawaii formally extended the Constitution and laws of the United States to the Territory of Hawaii.¹¹ While it is true that the political rights enjoyed by the inhabitants of a territory are privileges held in the discretion of Congress,¹² personal and civil rights of the inhabitants are secured to them irrevocably by the Federal Constitution.¹³ The only restraint upon either Congress or the territorial legislature in respect to the affairs of the Territory, is the Federal Constitution.

THE GENERAL ORDERS OF THE MILITARY GOVERNOR

It will be observed that the orders of the Military Governor proceed upon the theory that as a result of the declaration of martial law and the appointment of the Commanding General as Military Governor of the Territory, all of the executive, legislative and judicial power is vested in the Military Governor; that he is not bound by the laws of the Territory or the provisions of the Federal Constitution, or, in the alternative, they are suspended by the existence of martial law.

The general orders of the Military Governor cover a wide range of subjects, the jurisdiction and powers of all civil courts, the creation of military tribunals for the trial of civilians, regulation of traffic, firearms, gasoline, liquor, food-stuffs and feed, the possession of radios, the censorship of the press, communications by wireless, cable and wireless telephone, the freezing of wages for all

⁸31 Stat. (1900) 141, 48 U.S.C. (1940) §491.

¹⁰Mormon Church v. United States (1889) 136 U.S. 1, 43; *Binns v. United States* (1904) 194 U.S. 486, 491; *Inter-Island Co. v. Hawaii* (1938) 305 U.S. 306, 314.

¹¹Hawaiian Organic Act §5. "The Constitution and . . . all the laws of the United States . . . not locally inapplicable, shall have the same force and effect within and Territory of Hawaii as elsewhere in the United States . . ." 31 Stat.(1900) 141, 36 Stat. (1910) 443, 48 U.S.C. (1940) §495.

¹²*Dorr v. United States* (1904) 195 U.S. 138, 149; *Balzac v. Puerto Rico* (1922) 258 U.S. 298.

¹³*Murphy v. Ramsay* (1885) 114 U.S. 15, 44; *Hawaii v. Mankichi* (1903) 190 U.S. 197; *Rasmussen v. United States* (1905) 197 U.S. 516; *Farrington v. Tokushige* (1927) 273 U.S. 284, 299, *Cf. Balzac v. Puerto Rico*, *supra* note 12, as to the status of an unincorporated territory.



persons employed on the Island of Oahu, and the regulation of the possession of currency.

General Order No. 4 erects military tribunals for the trial of all civilians for offenses against ". . . the laws of the United States, the laws of the Territory of Hawaii or the rules, regulations, orders or policies of the military authorities." These tribunals are guided by but ". . . are not bound by the limits of punishment prescribed in said laws"

It should be noted that Order No. 4, coupled with General Orders Nos. 29 and 57, prohibiting the civil courts from exercising their statutory criminal jurisdiction, places the entire administration of criminal law in the hands of military tribunals. The substantive crimes for which persons are tried before military tribunals are offenses against the federal and territorial statutes, and offenses against ". . . the rules, regulations, orders or policies of the military authorities." From this it would seem that any violation of a general order issued by the Military Governor would carry with it criminal sanctions. The military tribunals are not bound by the penalties prescribed in any written law.

The problem thus is presented whether martial law can lawfully continue in the Territory of Hawaii, and whether there exists any warrant for the trial of civilians by military tribunals.

THE CONSTITUTION AND TRIAL OF CIVILIANS BY MILITARY TRIBUNALS

As has been pointed out recently by Mr. Chafee, "The first ten amendments were drafted by men who had just been through a war. The Third and Fifth Amendments expressly apply in war."¹⁸ This point cannot be overemphasized, particularly in view of the fact that some well-meaning but overzealous persons are bound to resort to the view that a state of war suspends the Constitution. This view discloses a lack of knowledge of American history.

Article III, Section 1 of the Constitution provides,

"The judicial Power of the United States shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish"

Article III, Section 2, provides,

". . . The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"

The Fifth Amendment says,

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger"

and the Sixth that,

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"

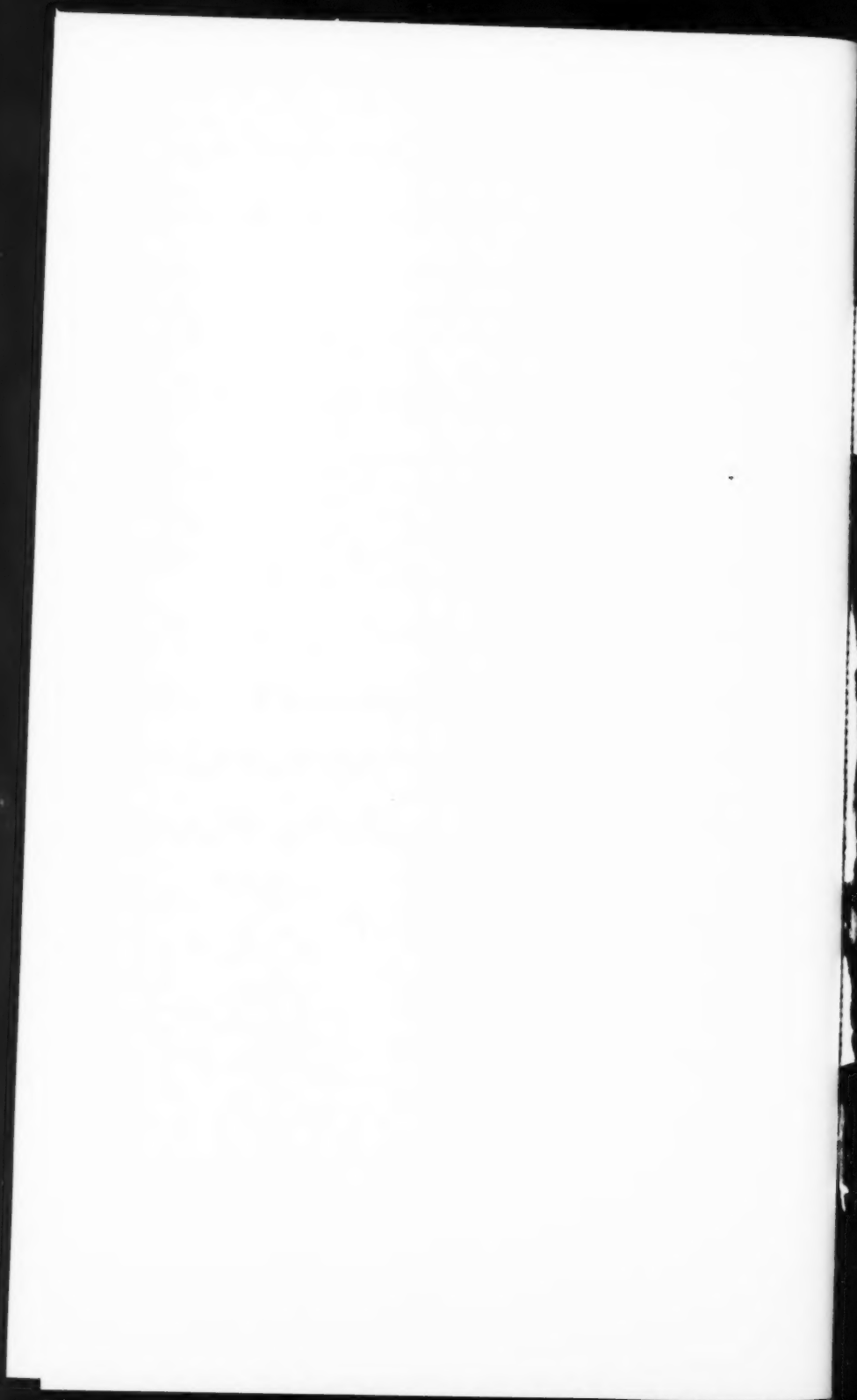
It should be noted that the Fifth Amendment says that

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury"

and the only exceptions are cases arising in the armed forces. This unequivocal language cannot be explained on the score of inadvertence.

There has been a real invasion of Hawaii, brief though the attack was. It is safe to assume that hostile craft (surface, submarine and aircraft) are or may from time to time be, present in the immediate vicinity of Hawaii. There

¹⁸Chafee, *Free Speech in the United States* (1941) 30.



of course exists no insurrection or hostile occupation of the Islands. The civil authorities have not been deposed by any invader from without, or rebel from within. The courts would have opened for business in their free and unobstructed scope on the Monday following the attack but for the order of the Military Governor. The general orders creating the military commission and provost courts were confined to the trial of criminal cases. No order has been issued empowering military tribunals to conduct the civil business of the Territory. On December 16, 1941, the civil courts were permitted to open to a limited extent for the trial of civil cases.¹⁹

The latest order of the Military Governor relating to civil courts is General Order No. 57, which permits the courts of the Territory "as agents of the Military Governor" to operate to a limited extent, prohibiting the summoning of the grand jury, trial of criminal cases, trial by jury, compulsory attendance of witnesses, and the maintenance of any action against any member of the armed forces or other persons employed under direction of the Military Governor or engaged in defense work, for any act done in the course and scope of their employment.²⁰ The limitations thus imposed by the Military Governor upon the civil courts, for all practical purposes, render them powerless, except in cases where no jury has been demanded, or in equity and probate cases where the compulsory attendance of witnesses is not necessary.

It is difficult to see how a judge holding a commission from the President of the United States, who has taken an oath of office to discharge faithfully and impartially the duties of his office and "to support and defend the Constitution and laws of the United States" can act as an "agent for the Military Governor" or as an agent for anyone else.

The Constitution does not contain the term "martial law." Nor is that expression used in any existing federal statute which has come to the author's attention, other than the Organic Acts governing Hawaii,²¹ the Philippines²² and Puerto Rico.²³ The legislative basis for military tribunals erected for the trial of civilians, is, as might be expected, rather slender.

The first chapter of *A Manual for Courts-Martial, U. S. Army*, issued by executive order of President Coolidge, sets forth the sources of military jurisdiction.

"1. The sources of military jurisdiction include the Constitution and international law, the specific provisions of the Constitution relating to such jurisdiction being found in the powers granted to Congress, in the authority vested in the President, and in a provision of the fifth Amendment.

"2. Military jurisdiction is exercised . . . by a government temporarily governing the civilian population of a locality through its military forces, without the authority of written law, as necessity may require (martial law) . . ."²⁴

Two sections of the Articles of War bear upon this subject.

"The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed, as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals."²⁵

"Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any

¹⁹Appendix V.

²⁰Appendix VI.

²¹31 Stat. (1900) 133, 48 U.S.C. (1940) §532.

²²39 Stat. (1916) 553, 48 U.S.C. (1940) §1111.

²³31 Stat. (1900) 81, 39 Stat. (1917) 995, 48 U.S.C. (1940) §771.

²⁴(1928) 1.

²⁵Article of War 15, 41 Stat. (1920) 790, 10 U.S.C. (1940) §1486.



of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof suffer death."²⁶

The Espionage Act of 1917²⁷ inferentially at least contemplates the possibility of the trial of civilians by military tribunals under the Articles of War and the Articles of Government of the Navy.

The leading American case on the subject of martial law is *Ex parte Milligan*.²⁸ Milligan, a resident and citizen of Indiana, was tried by a military commission on the charge of conspiracy against the United States, found guilty and sentenced to be hanged on May 10, 1865. He was not a prisoner of war, or a member of the armed forces. On May 10 he filed a petition for a writ of habeas corpus in the circuit court of the United States sitting at Indiana. The court, unable to agree on the disposition of the petition, certified the case to the Supreme Court.

It was conceded that in the actual theatre of operations the ordinary rights of citizens must yield to paramount military necessity, but it was contended that since Indiana was not the actual scene of military operations the military commission was without jurisdiction. The Court was unanimous in the opinion that under the act of Congress the military commission had no jurisdiction of the case. This ruling was sufficient to dispose of the litigation. The majority of the Court, however, went beyond the question necessary to dispose of the case and held that Congress was without power to provide for the trial of citizens by military commissions except in the locality of active hostilities and when access could not be had to the courts. Justice Davis, the appointee and personal friend of President Lincoln, wrote the opinion maintaining the inviolability of the Fifth and Sixth Amendments during time of war.

The minority opinion by Chief Justice Chase agreed that under the act of Congress the military commission was without jurisdiction and that the writ should be granted, but dissented from the view that Congress was without power to authorize the creation of a military commission for the trial of civilians.

"We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana."²⁹

"... it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety."³⁰

The arguments in the *Milligan* case were concluded on March 18, 1866, and the conclusion of the Court announced April 3, 1866. The opinion, however, was not filed until December 17, 1866. It has been

"... so long recognized as one of the bulwarks of American liberty that it is difficult to realize now the storm of invective and opprobrium which burst upon the Court at the time when it was first made public."³¹

WHAT IS MARTIAL LAW?³²

Whatever may be the law of England today, there seems to be little doubt but that in this country there can be no trial of a civilian by military

²⁶Article of War 82, 41 Stat. (1920) 804, 10 U.S.C. (1940) §1554.

²⁷40 Stat. 219, 50 U.S.C. (1940) §38.

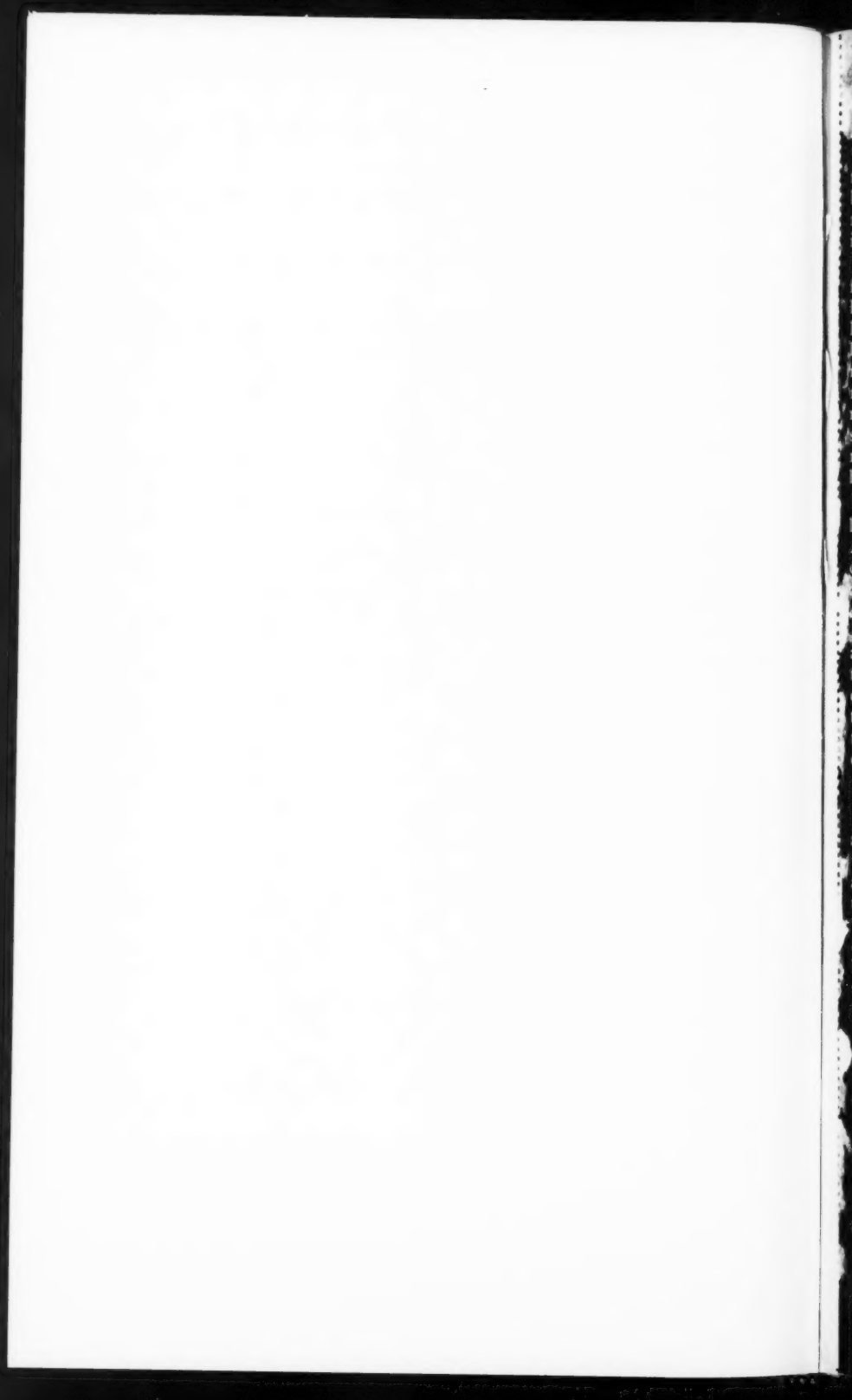
²⁸(1866) 71 U.S. (4 Wall.) 2.

²⁹*Ibid.* at 137.

³⁰*Ibid.* at 140.

³¹2 Warren, *The Supreme Court in United States History* (1928) 427.

³²Sir Frederick Pollock has dissected this problem with his usual clarity and concludes that it is "... an unlucky name for the justification by the common law of acts done for the defense of the Commonwealth when there is war within the realm." *Op. cit. supra* note 51, at 156. See also Fairman, *The Law of Martial Rule* (1930).



tribunals in time of war unless such a trial has been expressly authorized by statute, and if such a statute has been enacted the second problem must be resolved, and that is the validity of a statute authorizing the trial of civilians in a manner other than in accordance with the Federal Constitution.⁵⁴

The term "martial law" is, as has been long observed by the legal profession, inaccurate and misleading, this despite the exposition of the subject by Chief Justice Chase in his dissenting opinion in the *Milligan* case, and other lawyers who have explored the field. Some of the confusion, undoubtedly, is historical. The term originally applied to the discipline of the army as administered in the court of the marshal and constable.⁵⁵ It has been applied to the rule by an invading general over a conquered country. No argument should be necessary to distinguish between the powers of an invading general on foreign soil and the powers of our own forces over our own people. Nevertheless, a recent book on the subject perpetuates the confusion that had to a large measure been dissipated by the Civil War cases.⁵⁶

It is important to distinguish between the concept of martial law in civil law countries and in those where the common law obtains.⁵⁷ Under Anglo-American law, a soldier is not only subjected to special liabilities in his military capacity, but he is also subject to all of the liabilities of an ordinary citizen, and a soldier cannot ". . . plead the command of a superior, were it the order of the Crown itself, in defense of conduct otherwise not justified by law."⁵⁸ Mr. Dicey points out that two all-important considerations are necessary to an analysis of what is meant by martial law. The first is the equality of all before the law ". . . which negatives exemption from the liabilities of ordinary citizens or from the jurisdiction of the ordinary Courts. . . ." and second, the personal responsibility of wrong-doers ". . . which excludes the notion that any breach of law on the part of a subordinate can be justified by the orders of his superior."⁵⁹

WHAT IS THE LAW OF HAWAII?

The question arises, what is the law of Hawaii today? A variety of views are current among the members of the legal profession of this Territory. One view is that the proclamation of martial law suspends all existing law, and indeed all provisions of the Constitution itself. This would mean that not only the territorial statutes, but also the acts of Congress would not be in force in the Territory during martial law. This obviously cannot be true. We surely are obliged to pay our taxes, comply with the Selective Service Act, obey the customs laws, refrain from violating territorial and federal statutes, live up to contractual obligations and respond in damages for torts. Enforceable rights under

⁵⁴*Ex parte Milligan*, *supra* note 28; *in re Egan* (C.C.N.D.N.Y. 1865) Fed. Cas. No. 4,303; *Johnson v. Duncan* (La. 1815) 3 Martin L. R. (O.S.) 530, 6 Am. Dec. 675; *McConnell v. Hampton* (N. Y. Sup. Ct. 1815) 12 Johns. 234; *Smith v. Shaw* (N. Y. Sup. Ct. 1815) 12 Johns. 258; and see 65 L. R. A. 200 *et seq.* See also Ballantine, *op. cit.* *supra* note 51; Ballantine, *Unconstitutional Claims of Military Authority* (1914) 24 Yale L. J. 189.

⁵⁵ Holdsworth, *A History of English Law* (1922) 573; 6 *ibid.* 226.

⁵⁶ Rankin, *When Civil Law Fails* (1939). For an able review of this book, see Book Review (1939) 53 Harv. L. Rev. 356.

⁵⁷ Cf. Ballantine, *Qualified Martial Law* (1915) 14 Mich. L. Rev. 102, 203, 204.

⁵⁸ Dicey, *Law of the Constitution* (8th ed. 1915) 282.

⁵⁹ *Ibid.* This generalization finds support in the decisions of the Supreme Court. *The Flying Fish* (1804) 6 U.S. (2 Cr.) 170; *Mitchell v. Harmony* (1851) 54 U.S. (13 How.) 115; *Sterling v. Constantin* [(1932) 387 U.S. 378] at 401. But like all generalizations this one may be false. Cf. *Torts Restatements* (Am. L. Inst. 1934) §146; Note (1942) 55 Harv. L. Rev. 651.



contracts and for trespasses are arising every day. The existence of martial law cannot put an end to or suspend all existing jurial relationships, nor can it prevent the creation of new ones.

Another view is that the entire body of the common law, together with the federal and territorial statutes, is the law of Hawaii today in so far as permitted and except as expressly superseded by orders of the Military Governor. It has been suggested that the confirmation by the President of the Governor's proclamation of martial law has the effect of making the orders of the Military Governor considered the orders of the Commander-in-Chief, the President of the United States. This would seem rather tenuous, however, since the President has not in fact issued a proclamation authorizing the establishment of military commissions or the suspension of all existing law. The President did approve the action of Governor Poindexter in suspending the privilege of the writ of habeas corpus and placing the Territory under martial law. Moreover, there is no legislative authority given to the President that authorizes him to erect military tribunals for the trial of citizens.

Perhaps one of the reasons of the reluctance of the Military Governor to reopen the courts to their normal functions is that if this were once done the whole framework of the present military government and martial law would fall under the majority opinion in *Ex parte Milligan*. Not even the minority in the *Milligan* case ever thought or suggested that the President alone could erect military commissions in localities where the courts were open. They insisted that "... it is within the power of Congress to determine in what states or districts such great and imminent danger exists as justifies the authorization of military tribunals for the trial of crimes. . . ."⁶⁰

The true view would seem to be that the law of Hawaii today consists of the federal and territorial statutes, the common law except as modified by judicial precedent, and the orders of the Military Governor which may be justified in accordance with principles of the common law as to military necessity in the ordinary courts.

The situation in Hawaii presents one of the most profound problems which has confronted American democracy since the Civil War. On the one hand, no obstacle can be placed in the path of the military commander lest all be lost and at the same time a practical reign of law must be devised for a civil community of some 400,000 inhabitants.⁶² Lincoln's remarks to the serenaders are apposite.

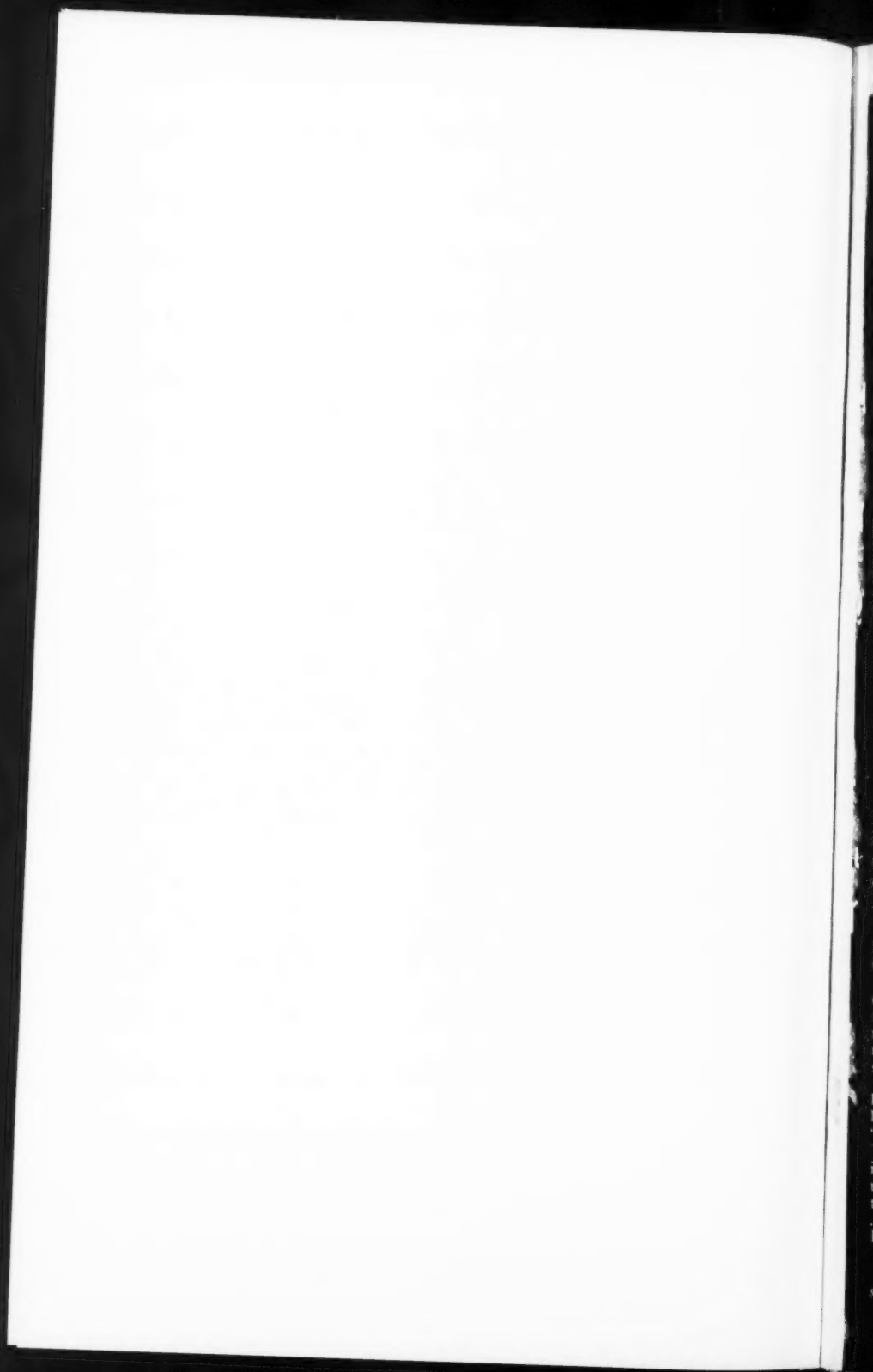
"Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?"

It will not be asserted that the ordinary civil courts are unable to perform their normal functions. As a matter of fact, they are actually in operation today curtailed only by the limitations placed upon them by the Military Governor pursuant to General Orders Nos. 29 and 57. Under the majority opinion in the *Milligan* case, the continuance of martial law and the erection of military tribunals for the trial of civilians is invalid. Likewise, under the majority opinion the section of the Organic Act which permits the declaration of martial law in case of "a threatened invasion" would fall.

As has been pointed out already, the majority went beyond what was necessary to the decision of that case to hold that under any circumstance it was

⁶⁰*Supra* note 28, at 140.

⁶²The presence of a large number of persons of Japanese descent cannot be safely ignored. The population of Hawaii as of July 1, 1941 (board of health estimate) was 465,339, of which 124,351 were American citizens of Japanese ancestry, and 35,183 Japanese aliens.



beyond the power of Congress to provide for the trial of civilians by military commissions in localities where the ordinary civil courts were open. The present situation in Hawaii now puts the majority opinion to a critical test. Possibly it cannot stand the impact of the grim reality that now confronts us. This conclusion is reached with full cognizance that it is based upon the doctrine of necessity found to be so abhorrent to constitutional government in the *Milligan* case. The United States must have and exercise every power necessary to the successful prosecution of the war, and where the exercise of that power infringes the ordinary rights of the individual, the latter must be sacrificed to the paramount end, and at the same time the curtailment of the rights of the individual should and must be done under a reign of law with the substance of the Bill of Rights preserved.⁶³

LEGISLATION IS THE REMEDY FOR THE PRESENT SITUATION

Since the term "martial law" has resulted in such confusion it should be abandoned in future legislation. To the military commander it means the rule of a community by his arbitrary will.⁶⁴ To most American lawyers it probably means the exercise of extraordinary powers by the military commander within the framework of existing law and constitutional limitations, with the acts of the commander reviewable by the courts when peace is restored, or even during the existence of a state of war if the ordinary courts have not been deposed by invasion from without or insurrection from within. The fallacy of thinking that a declaration of martial law extinguishes or suspends all existing law has already been exposed.

Legislation is necessary to afford a solid legal basis for accomplishing the ends desired by the military commander.

The following legislative program is suggested under what might be called "The Combat Area War Powers Act":

(1) Authorize the President by proclamation to define combat areas in the United States, and to exercise extraordinary powers in combat areas upon a finding by him that such areas have been attacked by the enemy, with authority in the President to delegate such powers to the military commander of the combat area;⁶⁵

⁶³Ballantine, *Constitutional Limitations on the War Power* (1918) 6 Calif. L. Rev. 134, 135; Ballantine, *The Effect of War on Constitutional Liberty* (1917) 24 Case & Comment 3.

⁶⁴This view is not confined to military men. See Hatcher, *Martial Law and Habeas Corpus: Extent of War Power in Emergency* (1939) 25 A.B.A.J. 375, 379. "Wherefore, not only upon the actual theater of war, but wherever an emergency of war arises, the violation of every civil constitutional right impeding the war power is justified, if necessary. At peace, civil law should be absolute; at war, martial rule, wherever necessary, must be absolute."

⁶⁵The letter of an able student of American government to Senator Overman on a bill to divide the country into military districts during the first World War should not be overlooked.

"My dear Senator:

"Thank you for your letter of yesterday. I am heartily obliged to you for consulting me about the Court-Martial bill, as perhaps I may call it for short. I am wholly and unalterably opposed to such legislation. . . . I think that it is not only unconstitutional, but in its character it would put us upon the level of the very people we are fighting. . . . It would be altogether inconsistent with the spirit and practice of America. . . . I think it unnecessary and uncalled for . . .

"Woodrow Wilson."

8 Baker, Woodrow Wilson, *Life and Letters* (1939) 100; see also Chafee, *op. cit. supra* note 18, at 38.



(2) Authorize the President or the military commander of the combat area to promulgate rules, regulations and orders within the combat area which will have the force and effect of law. The substantive scope of such rules, regulations and orders should be sufficiently broad to clothe the military commander with every needed power, and probably should include the following fields: police and traffic regulations, regulations governing public utilities and common carriers, the safety of the armed forces and military establishments, transportation and blackout regulations, the sale, distribution and consumption of intoxicating liquor, food stuffs, liquid fuel and other essential materials, and the requisitioning of real and personal property, with provision for summary review in the federal courts of any rule, regulation or order in excess of the authority granted by Congress;

(3) A declaration by Congress that all law in the combat area, federal, state, territorial, or municipal, shall remain in full force and effect, except as modified by rules, regulations or orders within the field in which Congress has authorized the President to act;

(4) Wartime censorship should be administered by the censorship bureau created by Congress under statutes of general application;

(5) Authorize the President to suspend the privilege of the writ of habeas corpus as to all aliens and dual citizens of the United States and an enemy country. As to citizens of the United States, the privilege of the writ of habeas corpus to be suspended upon the following terms:

(a) That lists of all persons apprehended and detained by either civil or military authorities be filed with the clerk of the federal court located in the combat area;

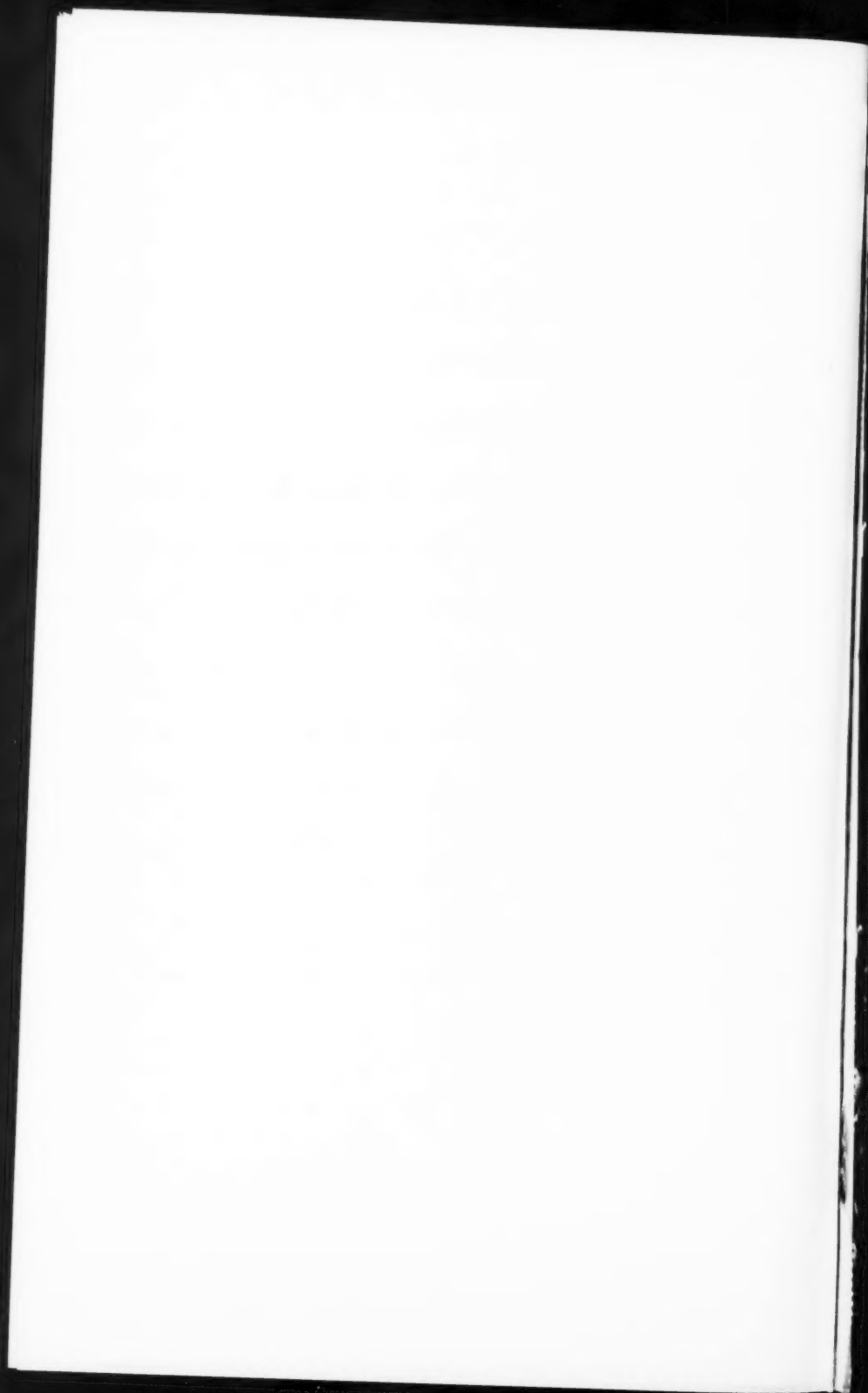
(b) That in combat areas where the civil courts are open and are able to function, detention shall not continue for longer than thirty days, unless within such period an indictment or information shall have been returned in the federal court against the person detained;

(6) Authorize the President to create military tribunals for the trial of all persons within the combat area charged with the violation of any rule, regulation or order of the military commander, the punishment for such offenses not to exceed one (1) year in jail, or a fine of one thousand dollars;

(7) The trial of all felonies committed within the combat area, whether before or after the date of the President's proclamation defining the combat area, to be had in the civil courts, affording a trial by jury if demanded by the accused, and in the event the court shall make a preliminary finding that the summoning of a jury would have any substantial effect in impeding the war effort in the combat area, the trial be without a jury or continued until such time as a jury might be impaneled, with discretion in the trial court to refuse to admit an accused to bail pending trial.

CAVEAT!

THE Board of Police Commissioners have called our attention to its well-taken position against the public solicitation of funds or the sale of tickets by so-called "Police Associations" other than the Los Angeles Police Department, and its request that all persons solicited contact the office of the Commission before contributing. The reason, we are told, is the continued solicitation for funds, advertising and the purchase of tickets by "peace officers," "police officers," and "official police" associations, which solicitations are for other purposes than the direct benefit of the community and the members of the Police Department.



EFFECT OF THE WAR ON BAR ADMISSIONS*

By Herbert W. Clark†

AS A RESULT of the events of December 7, 1941, and the acceleration of the Nation's preparation for war, there arose an insistent demand that "something be done" for law students who had been or might be inducted into the armed services before they had finished their law studies or before they had had opportunity to take the examinations set by the State Bar of California. The purpose of this short paper is to set forth the concrete results of the consideration given by the Committee of Bar Examiners to such of the suggestions to "do something" as have been presented to the Committee.

Preliminarily, it is pertinent to state that the standards now required by law to be met by an applicant for admission to the State Bar of California have been more than a generation in the making; and that it is only since the organization of the State Bar in 1927 that minimum requirements have become firmly established. Ill-considered action may destroy the minimum requirements or standards in a moment. If they are destroyed, or even seriously impaired, it is probable that another generation or more would be required to build them up again to their present level. It is apparent, therefore, that the Committee of Bar Examiners, charged as they are in substantial measure with the duty of administering the law and rules relating to the standards for admission to the State Bar, are under the necessity of examining in every aspect every suggestion made to them for the aid of law students who have been or might be inducted into the armed services. Two aspects, stated in question form, seem to be most important. They are:

If adopted, will a proposed suggestion tend to aid the war effort?

If adopted, will a proposed suggestion tend to lower the professional quality of members of the State Bar?

The above form of stating these two questions minimizes the interests of the individual candidate for admission; but it is believed that the interest of the public in well trained and competent lawyers is superior to the interest of the individual who wishes to be admitted to the bar.

The Committee of Bar Examiners have not found themselves able to say that there is such a relationship between a law student's qualifications to be admitted to the State Bar and the necessity he may be under to enter the armed services as to warrant a lowering of the standards for admission.

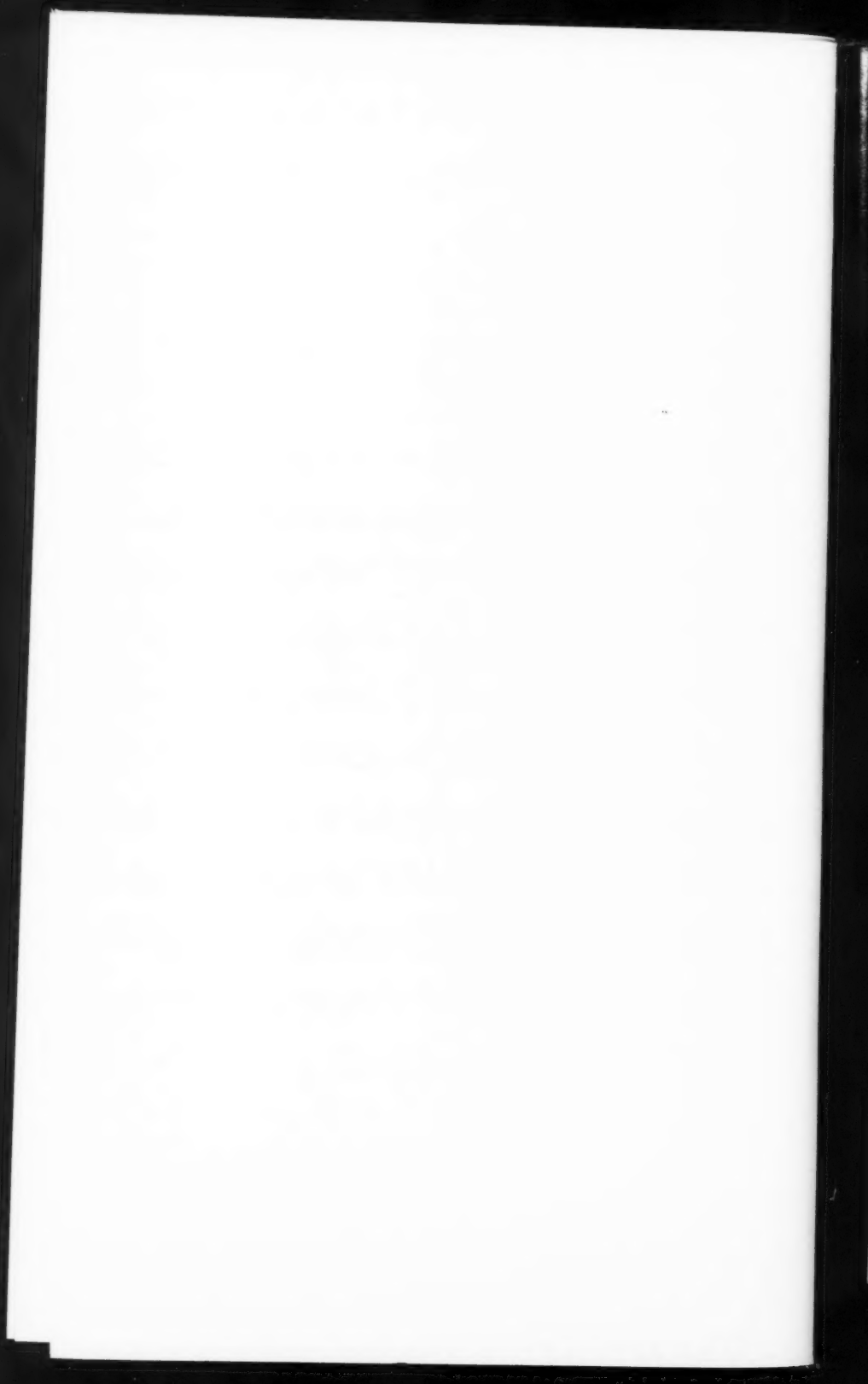
A recent graduate of a medical school and a recent graduate of an engineering school have acquired special skills which are of immediate value in war. The recent graduate of a law school has not, however, acquired special skills which are of immediate value in the making of war. This viewpoint may not be pleasing to law students but it is believed to be realistic.

With the foregoing principles in mind, the Committee of Bar Examiners have considered many suggestions for aid to law students in these harsh times. Of the total number so far considered, several have been favorably acted upon because, in the opinion of the Committee, they were believed to be in the public interest and would not, if adopted, tend to lower the professional quality of members of the State Bar.

The date of the bar examination has been changed from the month of October to September 14th, 15th and 16th this fall. This was done in the hope that it would enable some at least of the general applicants who are going into

(Concluded on Page 254)

*The title was selected by the Editor, not by the writer. H. W. C.
†Of the San Francisco Bar. Chairman of the Committee of Bar Examiners of the State of California.



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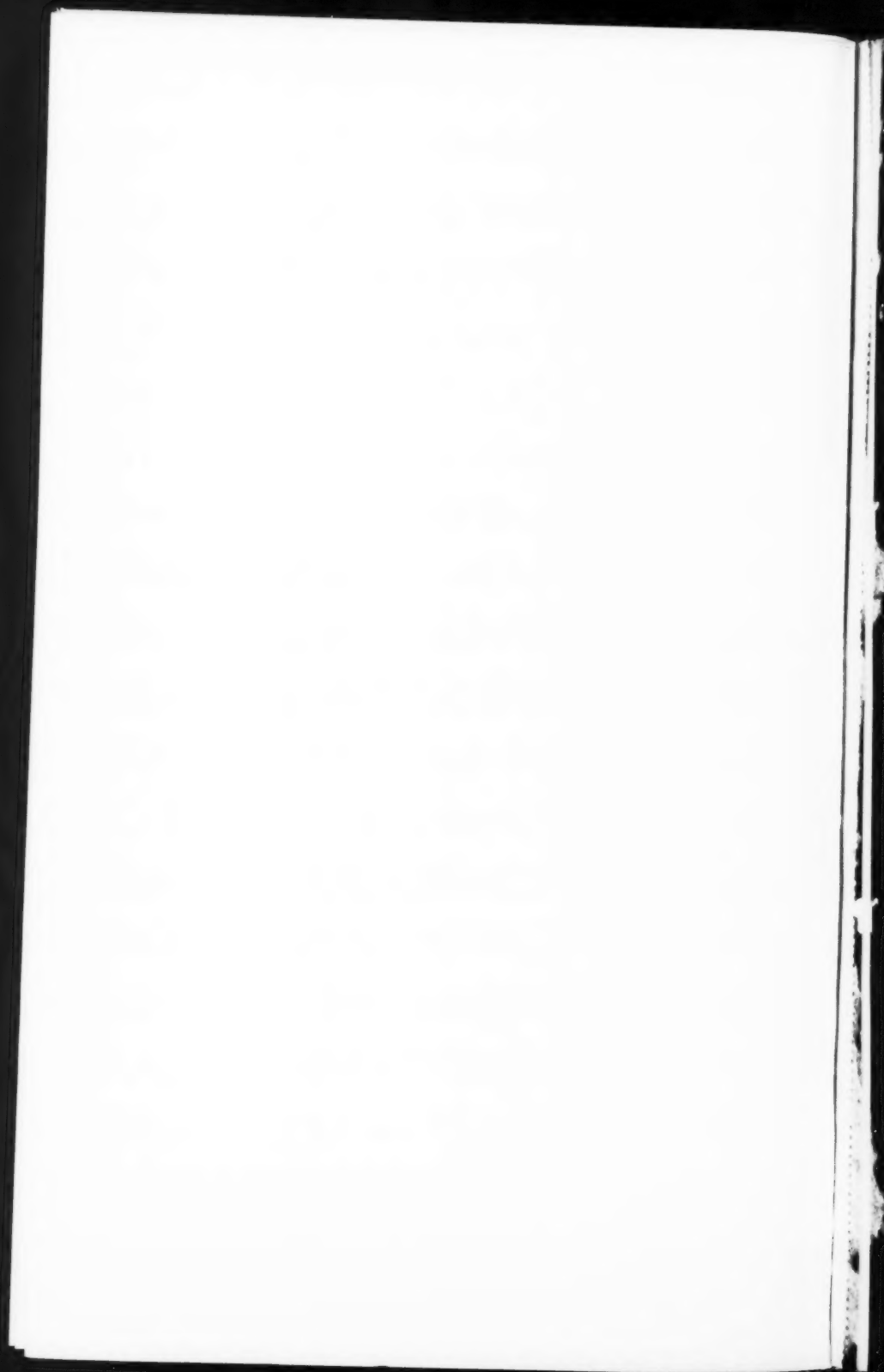
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ROLL OF HONOR

Members of the Bar continue to take their place in the service of the Country. During the past month the following names have been added to the Roll of Honor of the Association:

J. Garrison Gemmill, Private USA; Guy Preston Greenwald, Jr., Ensign, USNR; Herbert Hazeltine, Jr., Lt. (SG) USNR; W. Sumner Holbrook, Jr., Capt. USA; Julian Isen, USA; Cassell Jacobs, Lt. (SG) USNR; Randolph Karr, Capt. USA; Arthur B. Knight, Private USA; Robert E. Kopp, Aviation Cadet; Hilton H. McCabe, USA Air Corps; Eldon V. McPharlin, Private USA; Jacob Jay Moidel, P.F.C. USA; Van C. Ninen, Lt. (j.g.) USNR; Kenneth O. Rhodes, Lt. (j.g.) USNR; Lee Schwartz, Private USA; William D. Sommers, Jr., Lewis T. Sterry, Ensign USNR; James B. Stoner, Private USA; Arthur L. Syvertson, Lt. Naval Air Corps; Arthur Wright, Jr., Lt. Air Corps. Last month, also, Henry Duque, well known member of the Bar, was appointed as regional director in charge of traffic and evacuation for the ninth civilian defense region.

AN INDEX TO BAR ASSOCIATION PROCEEDINGS

We are informed that the American Association of Law Libraries has just published an index to State Bar Association Proceedings and Reports, edited by Dr. Dennis A. Dooley, State Librarian of Massachusetts, which contains some 41,400 entries. The large amount of legal material available in such proceedings, heretofore generally inaccessible, is now available with little effort. Copies may be purchased from the American Association of Libraries, 42 West 44th St., New York. The price is \$3.00 and the edition is limited.

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EFFECT OF THE WAR ON BAR ADMISSIONS

(Continued from Page 251)

military service to take the bar examinations before they are inducted into the service. Careful consideration was given to the suggestion that an examination should be given in April or May of this year for general applicants. Because of the comprehensive character of the examinations, and upon the advice of law schools of the state, it was decided that it would be unfair to applicants to give such an examination because adequate time for preparation would not be afforded.

The number of optional questions to be given at the September examination this year has been increased by two. Answers will be required to 24 out of 29 questions instead of to 26 out of 29 as was the case in the 1941 bar examination. This increase in the number of optional questions should be of some assistance to applicants who, because of the imminence of their induction into the armed services, may not have had time adequately to review for their examination.

General applicants who are already in the armed services of the Government or of the State of California will be permitted to take the September, 1942, bar examination at the stations where they are located, under rules and regulations prescribed by the Committee, if proper arrangements can be made with the military and naval authorities. This matter was taken up with the military and naval authorities and favorable responses were received. Accordingly, it will be possible for a general applicant who is already in the military service to take the September examination at the place where he is stationed if he is in all other respects qualified and has notified the Committee in accordance with the rules specially adopted and which have already been given wide circulation.

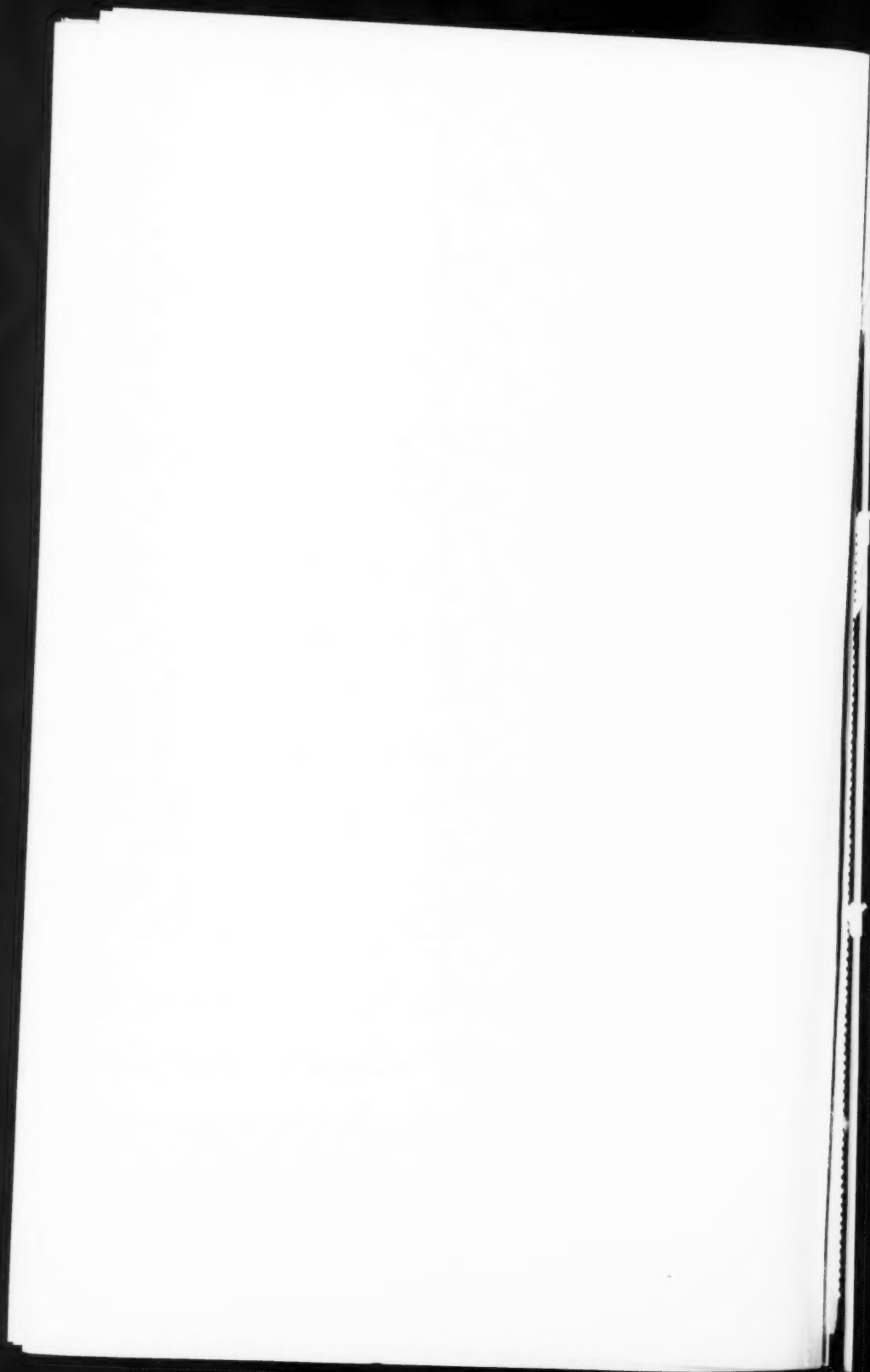
The Committee has ruled that upon application therefor, the entire \$30 filing fee paid by a general applicant will be refunded if such applicant is unable to take the September, 1942, bar examination because of his duties with the armed forces of the nation or the state.

Lastly, if a student has completed sufficient of the regular course of an accredited law school to enable such school fairly to consider as *de minimis* the uncompleted part and to award him the regular degree, and the Committee determine that the action of such school is not unreasonable, such student will be eligible to take the required bar examination in September if he is otherwise qualified.

The Committee are giving serious consideration to the question of what should be done to enable returning members of the military forces, who had not completed their law studies or had not taken their examinations for admission before they entered such services, to complete their law studies and prepare themselves to take the bar examinations after the war. Discussions have been had with the Board of Governors about this phase of the matter and it is hoped that in regular course sound plans can be devised which will adequately meet the situation that will exist when the war is over.

A CALL FOR HELP

The American Red Cross asks for the loan of three dictaphones, one transcriber and one record-shaver. The Field Director's Office in Hollywood is doing all Red Cross work in connection with the armed forces in this district and carries an increasing load which would be greatly lightened if its dictating equipment could be increased for the use of its field men. Any attorney having such equipment available for this purpose should get in touch with Mr. Davenport at 1456 Bronson Avenue, HEMPSTEAD 3261. Mr. Davenport assures us that the equipment will be fully serviced, and will be returned to the owners on request.



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FAIR ADVERTISING

IN the BULLETIN for May we commented on the notable type of advertising of benefit to lawyers published by Title Insurance & Trust Company. We note here with equal interest the advertisements of The Lawyers Co-operative Publishing Company and Bancroft-Whitney Company appearing in *Time*, which are being "Published in Behalf of the Public and the Legal Profession." The fifth of this series now on our desk was published May 11, 1942, under the caption, "Real Estate Deals Demand a Lawyer." After pointing to the risks involved when parties enter into such a deal without the advice of counsel, the advertisement concludes: "Only your own lawyer can protect you dependably. Consult him."

Such copy is of benefit to the advertiser as well as to the Bar and to the Public, and the companies named above are to be thanked by all concerned. We wonder how much of the strenuously contested litigation of the past decade involving the unlawful practice of the law could have been avoided if such a policy had been adopted ten or fifteen years ago by the companies and institutions involved in that litigation.



THE AMERICAN LAW INSTITUTE CODE OF EVIDENCE

By William G. Hale,* of the Los Angeles Bar

THE American Law Institute initiated its evidence code project in May, 1939. Final action on the completed formulation was taken at the annual meeting in May, 1942. Whether and to what extent it shall become a part of the operative law now rests with the Bar of this and of other States. The members of the profession who recognize that the law is a growing thing, and that it is their duty to promote its growth will welcome the opportunity to study the code and, it is hoped, actively to support its enactment into law.

The Code is not the work of one man nor of a brief hour. Three years were devoted to its actual formulation. This leaves out of consideration the many years of special study and experience that the draftsman and his co-laborators brought to the task. In setting up the project, the Institute followed its usual procedure. The task of drafting was delegated to a small group of experts, drawn from the three branches of the legal profession, viz.: teachers of the law of Evidence, judges, and practicing lawyers. As Reporter and Assistant Reporter, Professor Edmund M. Morgan (now acting Dean) and Professor John M. Maguire, of the Harvard Law School, were selected. The Advisers, appointed to work directly with the Reporters, were: Wilbur H. Cherry, Professor, University of Minnesota Law School; Laurence H. Eldredge, Professor, University of Pennsylvania Law School, and formerly a trial lawyer of note in Philadelphia; William G. Hale, Dean, University of Southern California Law School; August N. Hand, Judge, United States Circuit Court of Appeals, Second Circuit; Learned Hand, Judge, United States Circuit Court of Appeals, Second Circuit; Mason Ladd, Dean, University of Iowa College of Law; Henry T. Lummus, Justice, Supreme Judicial Court of Massachusetts; Charles T. McCormick, Professor, Northwestern University Law School, now Dean, University of Texas Law School; J. Russel McElroy, Judge of a trial court in Birmingham, Ala.; Robert Patterson, Judge, United States Circuit Court of Appeals, Second Circuit (who resigned when he became Assistant Secretary of War); and Charles E. Wyzanski, Jr., of the Massachusetts Bar, now United States District Judge. John H. Wigmore, distinguished Dean Emeritus of Northwestern University Law School served as Consultant. All tentative formulations were submitted to him by Professor Morgan for comment and criticism and his comments always came before the Reporter and his advisers at their group meetings. A very considerable number of members of the Bench and Bar throughout the United States have also served as consultants in a collateral way. To them, tentative drafts were regularly submitted and their criticisms solicited. Some Bar Association Committees, as in California, have studied the project as it has progressed and have submitted their suggestions. A goodly number of state and local bar associations, at their annual or other meetings, have familiarized themselves with the work through addresses or round-table discussions. Tentative drafts of the code, in whole or in part, have been considered and voted upon at three Annual Meetings of the Institute.

In the making of the code, as indeed must be true in any work of codification, a major issue which arose at the very beginning was whether to formulate the code on a pattern of broad generalization or one of substantial detail. The esteemed Chief Consultant, Mr. Wigmore, insisted on the latter choice and suggested as the model his own well-known pocket code, which reaches between five and six

*The author is Dean of the University of California Law School and one of the Advisers to the Reporter for the American Law Institute on the Code of Evidence.

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hundred pages in extent. It goes into much detail. At the other extreme, were those who would formulate the law of Evidence in some half-dozen very broad principles, leaving their application to the full discretion of the trial judge. The Institute Code has not been constructed according to either of these theses. The plan followed has been rather a compromise between the two. Some of the rules are very general; others go into considerable detail. Complete agreement can never be expected in such matters. There is much room for difference of opinion. There is no fixed formula. Opinion alone will have to control. The Code is stated in 112 Rules. With somewhat elaborate notes and illustrations, the last draft contains 230 pages. The Rules are not numbered consecutively. In Chapter I they are numbered from 1 to 11, in Chapter II from 101 to 106, in Chapter III from 201 to 230, etc. So far as the content of the code is concerned, anything that can be stated in the brief space allotted to this article is of necessity wholly inadequate. No one can form a worthwhile judgment as to the code except by a painstaking and detailed study of it in its entirety. No talk upon the code or about it will suffice. However, a very sketchy view of some items in it will be attempted.

INCOMPETENCY OF WITNESSES

The common law had gone far in removing the barriers of incompetency. The code recognizes no incompetency except that which arises from lack of capacity to communicate perceived facts and to understand the duty to tell the truth. This, of course, apart from the competency of one to testify as an expert.

The Dead Man's Statute, which has had much vogue in the United States, is eliminated. England has gotten on well without it down through the years, as



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have a number of states. Experience in England, and in such states as Connecticut and Massachusetts which have never disqualified the survivor as a witness, would seem to demonstrate rather convincingly that the fears which some entertain for the estates of deceased persons if such disqualification is not retained are largely imaginative. A committee of the Massachusetts Bar, in a recent report on the Institute code, gave its full approval to the omission of this rule of disqualification in the following words: "When the common law disqualifications [of parties] were removed in Massachusetts in 1856 they were abolished in their entirety. We did not keep any disqualification with respect to persons suing the estate of a deceased person and we are not aware that there has ever been any demand for such a rule."¹

PRIVILEGES OF WITNESSES

The husband-wife privilege is retained so far as it relates to confidential communications. There is no restriction upon either spouse testifying for or against the other except as to confidential matters:

The attorney-client, the priest-penitent, the physician-patient, and the official information privileges are preserved essentially in their traditional form. The physician-patient privilege was not included in the draft of the code as submitted to the American Law Institute this past May; but, after prolonged debate, it was voted by a very narrow margin to add it to the code in such form as might be approved by the executive committee of the Institute. Such a provision, since tentatively formulated, will, if approved, differ only in a minor way from the present California provision (C. C. P. 1881(4)).

The privilege against self-incrimination is retained but is somewhat circumscribed. It is dealt with in detail in Rules 201-208, inclusive.

EXPERT AND LAY OPINION

Rule 401 of the code has undergone a number of changes since it was first formulated. The changes that have been made, I believe, fully meet the earlier criticisms. Because of the fact that it has been under consideration by committees of the State Bar of California in an earlier form and, as then worded, was the subject of much criticism, I will quote it as finally approved:

"Rule 401. Testimony in Terms of Opinion.

- (1) In testifying to what he has perceived, a witness, whether or not an expert, may give his testimony in terms which include inferences and may state all relevant inferences, whether or not embracing ultimate issues to be decided by the trier of fact, unless the judge finds:
 - (a) that to draw such inferences requires a special knowledge, skill, experience, or training which the witness does not possess, or
 - (b) that the witness can readily and with equal accuracy and adequacy communicate what he has perceived to the trier of fact without testifying in terms of inference or stating inferences, and his use of inferences in testifying will be likely to mislead the trier of fact to the prejudice of the objecting party.
- (2) The judge may require that a witness, before testifying in terms of inference, be first examined concerning the data upon which the inference is founded."

The rule, as now stated, involves no substantial departure from well-established precedent. In fact it is fair to say that it represents the uniform current of the law. Subsequent rules in this chapter go fully into the subject of expert evidence. The rules will not be here set forth or discussed in detail. Suffice it to say that they follow in substance the expert Evidence Statute as worked out by the Commissioners on Uniform State Laws. It took the com-

1. My views, fully set forth on this subject, as well as my criticism of the particular form of the California Statute (C. C. P. 1880(3)), can be found in 9 So. Calif. Law Rev. 35.

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missioners many years to evolve their statute. The traditional practice in the field of expert evidence has been a stench in the nostrils of all reputable members of the legal profession and of all honest-to-goodness experts. The solution offered doubtless has its faults. The whole problem is fraught with the greatest difficulty. I believe the solution offered is worth a fair trial. It is quite certain that the proposed rules will not make the situation worse than it now is.

Briefly these rules are designed: *first*, as a general practice, to insure the utilization only of experts appointed by the court (though the calling by a party of his own experts is not prohibited); *second*, to secure an opportunity for the experts to make an adequate study of the case; *third*, as far as possible, to bring their opinions, joined in if possible, into the open by requiring that they be written out and filed before the case comes on for trial, thereby rendering them subject to careful study by the parties, and *finally*, to do away with the traditional confused and confusing hypothetical question. If a party wishes to call at the trial an expert of his own choosing, he must normally give "reasonable notice to each adverse party of the name and address of the witness to be called." The judge may, however, waive this requirement.

HEARSAY EVIDENCE

It is fully anticipated that the treatment of hearsay will provoke a substantial amount of opposition. The main point of attack will be Rule 503, which is worded as follows:

- "Evidence of a hearsay declaration is admissible if the judge finds that the declarant
 (a) is unavailable as a witness [what constitutes unavailability is elsewhere defined], or
 (b) is present and subject to cross-examination."

It will doubtless be thought, as a matter of first impression, that sub-division (a) of this rule opens too widely the door to the introduction of extra-judicial statements which are untested and untestable by cross-examination. The value of cross-examination as a device for discovering truth is not to be minimized; though cross-examination by no means furnishes an infallible method of securing the truth. In general, the percipient witness should, when possible, tell his story in court and be subjected to cross-examination (or at least be open to cross-examination), even as in the best evidence rule the law appropriately prefers a writing as evidence of its contents, and dispenses with it only where it is made to appear that the writing is not available. But the best evidence rule does not exclude other evidence of its contents when the writing is not available. It tries to get the facts sought even though it be by an inferior and less convincing method. Likewise it is proposed in this hearsay rule to take the less satisfactory way to what the percipient knows, when he is not personally available. Given the choice between going completely without the information and taking what is available we choose the latter alternative.

Such a choice is not without a volume of respectable authority. Indeed, down through the years, some 18 or 19 exceptions have been established to the rule excluding hearsay. These established exceptions to the hearsay rule cover a wide range of human experience. An attempt to rationalize many of them has been made by pointing not merely to the necessity arising from the non-availability of the declarant but to special conditions surrounding the making of the statement raising a circumstantial probability of trustworthiness. But, by no stretch of the imagination, can it be thought that the circumstances accepted as supporting such probability constitute a fair substitute for oath, demeanor in court, and cross-examination. Except for the prior testimony exception, they serve at most to put the declarant in a subjective state of truthfulness. They leave untouched the



weaknesses arising from faulty observation, faulty memory and deficient narration. A candid look at the dying declaration exception will suffice to make the point.

A number of important exceptions, which no one now questions, even fall short of this mark. At times the authorities have been content to find merely the absence of a specific influence likely to induce falsification, and have not demanded the presence of a specific affirmative urge to tell the truth. Now, since the only purpose of the positive urge to truth-telling, emphasized in some of the exceptions, is to raise a fair inference of honesty, this deviation is not objectionable. It is a fair assumption that a person will speak the truth as he sees it, if he is free from a positive motive to lie. (Indeed, I am not sure that the positive motive to lie or shade testimony is not more often present when one is a witness in court than when he is speaking casually out of court.) Hence we arrive even in these two classes of exceptions at the same goal, viz.: a probability of subjective truthfulness. In neither do we have an adequate substitute for cross-examination. In other words, the courts have decided that we can get along without cross-examination. Nor do we need to stop here in scanning the traditional liberal attitude of the courts toward hearsay. There are a number of exceptions in which it is not even necessary to find that the declarant is non-available. His hearsay statements indeed seem to be as highly valued—even more highly valued than his cross-examined statements in court. Declarations of intent, declarations as to physical condition and spontaneous declarations are in point. Most of the courts arbitrarily evade the hearsay difficulties by classifying such declarations as non-hearsay²

Moreover, much hearsay has come in under other supposedly innocuous disguises such as *res gestae* (a term of convenient obscurity), and "verbal act" and conduct and language not offered to prove the truth of the facts asserted but nevertheless subject to true appraisal only by considering the actual state of mind and even the perceptive accuracy of the actor or speaker. Statements and conduct as evidence of insanity fall in this latter category. The fact that X declared himself to be the Pope, as evidence of X's mental unsoundness, is not generally considered hearsay, but the evidential value of the declaration depends on his actual belief about it. Or consider *Lanfield v. Albani Lunch Co.*,³ in which the court held that the defendant could properly show that no complaints of illness were made by persons other than the plaintiff who ate beans at defendant's restaurant on a certain day as evidence that the beans served were not unwholesome. This evidence supported defendant's contention only on the assumption that the other customers in effect said either that they had not been made ill, or, if made ill, that they did not think that they had been made ill by eating the beans. Here most, if not all, the weaknesses of hearsay were involved, but they passed through the hopper without even a passing mention. There was no quare even as to why the bean-eaters were not called as witnesses.

In a thorough survey of hearsay a few things stand out in rather bold relief, viz.:

- (1) We use an abundance of hearsay evidence, both recognized and unrecognized;
- (2) The express exceptions do not run true to any single pattern;
- (3) A number of the exceptions are not contingent upon the non-availability of the declarant, though more generally than not such non-availability is a requirement;
- (4) Some of the exceptions require a showing that the declarant was speaking under circumstances definitely calculated to put him in a

2. See *Mower v. Mower*, 64 Utah 260; also the *Hillmon Case*, 145 U. S. 285.

3. *Lanfield v. Albani Lunch Co.*, 268 Mass. 528.

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state of subjective truthfulness, *e. g.*, certainty of impending death in dying declarations; some others require merely a showing of the absence of circumstances that might induce falsehood, *e. g.*, that the declaration was made *ante litem motam*; other exceptions do not set up even these safeguards; and

- (5) Some existing statutes reach the limit of liberality, *e. g.*, the Vital Statistics Statutes. The report of the physician includes many matters not personally known to him. The report often includes hearsay upon hearsay upon hearsay.

The proposed rule, as set forth in 503(a) is thus more strict than some exceptions and more liberal than others. It is more strict than some in that it comes into operation only when neither the declarant nor his deposition is available. "Unavailability," as defined in Rule 1 (14), has been so defined as to place ahead of the hearsay declaration the deposition of the declarant if it can be secured conveniently and without undue expense. It is more liberal than some, in that it treats circumstances which bear on trustworthiness as bearing only on credibility, not on admissibility. This liberalizing step is in line with the history of the law of evidence pertaining to the competency of witnesses. A goodly number of circumstances that at one time excluded witnesses completely, now bear only on their credibility.

Subdivision (b) of Rule 503 ought not to provoke much controversy. Here the safeguard of cross-examination is provided. It will change the law both as to prior inconsistent and prior consistent statements. It will permit prior inconsistent statements to be used evidentially as well as to discredit the witnesses. This would be a desirable change if it did no more than to eliminate the hocus pocus of instructing the jury that under no circumstances are they to consider the prior statement as evidence of the matter asserted in it. It will render prior consistent statements admissible, ordinarily, though not falling within the present limitations relative to recent contrivance and bias.

SAFEGUARDS

Rule 503 needs to be read in the light of certain other rules in the Code, by virtue of which the judge may place some restrictions and safeguards upon its operation. Rule 8 vests in the judge authority to comment on the evidence. Therefore, he may give the jury advice to guide it in weighing hearsay when admitted, if he thinks such advice is needed. Rule 501 provides, in substance, that the declarant is subject to the rules that would be applicable to him if he were a witness, with the exception, of course, of the requirement of oath. This brings into operation Rule 101, with reference to the competency of witnesses, and Rule 104, under which the judge should exclude the evidence if satisfied that no jury could reasonably believe that the declarant had personal knowledge of the matter which his declaration was offered to prove. Under Rule 303, the judge may rule the hearsay out if in his judgment it was not worth the cost or is unduly likely to mislead the jury. Under Rule 531, the credibility of the declarant can be gone into as if he were a witness.

We do not flatter ourselves that any souls will have been saved by this very sketchy presentation of the code. At most we cherish the hope that a real interest in its study has been stimulated. The task that now falls to the profession is not a light one. It calls for an open-minded and basic re-examination of every familiar rule of the traditional law of evidence. The task must be done with something of the spirit and painstaking thoroughness that have gone into the making of the code itself. In this very serious undertaking to bring progress in an important branch of our procedural law the Institute solicits your interested cooperation.



1942 COMMITTEES OF THE ASSOCIATION

SPEAKING recently of the need for localized activity, James M. Landis, National Director O. C. D., said that "too many details should not be vested too high in the organization." That the Board of Trustees learned this long ago is evidenced by the long list of active committees appointed each year to handle the details of the Association's activities. The personnel of some of the committees serving the profession this year was reported in the March issue of the BULLETIN. Additional assignments are reported below:

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